

CHAPTER VIII

ANCILLARY PROCEEDINGS

A. INTRODUCTION

Certain instruments are issued by the Clerk after a judgment has been rendered in a civil case. Because these proceedings are subsequent to the case itself, they are called ancillary proceedings. A few of the most common ancillary proceedings are discussed in this chapter.

B. ABSTRACT OF JUDGMENT

An abstract of judgment is a summary of pertinent facts contained in a judgment, including the amount of judgment, the date the judgment was rendered, and the identity of the parties. The abstract may be issued at any time after judgment is rendered. When recorded and indexed, the abstract of judgment constitutes a lien on the defendant's real property.

*Property Code
Sec. 52.001*

A recorded abstract of judgment does not constitute a lien when the defendant has appealed the judgment and has posted the proper bond. Likewise, a lien is not created when the court issues a finding against creation of a lien. Such finding must be recorded in each county where the abstract was recorded.

*Property Code
Sec. 52.0011*

An abstract of judgment may be prepared by either the clerk or the person in whose favor the judgment is rendered, or by that person's agent or attorney. If the abstract is prepared by someone other than the Clerk, the person preparing it must also verify it.

*Property Code
Sec. 52.002*

If the Clerk prepares the abstract, the applicant for the abstract must pay the appropriate fee.

An abstract of a judgment must show the following:

*Property Code
Sec. 52.003*

- Names of the plaintiff and defendant
- Birthdate, last three numbers of the driver's license number, and last three numbers of the social security number of the defendant, if available
- Number of the suit in which the judgment was rendered
- Defendant's address, or if the address is not shown in the suit, the nature of citation and the date and place of service of citation
- Date on which the judgment was rendered
- Amount for which the judgment was rendered and the balance due
- Amount of the balance due, if any, for child support arrearage
- Rate of interest specified in the judgment

Section 52.003 further states that an abstract may show the mailing address for each plaintiff or judgment creditor. However, if the judgment was abstracted after September 1, 1993, it must show the plaintiff's or judgment creditor's mailing address. If the address is not included, a penalty filing fee of \$25 or twice the recording fee for the abstract, whichever is greater, must be paid.

*Property Code
Sec. 52.0041*

A judgment lien continues for 10 years after the date of recording, unless it is a judgment in favor of the State, in which case the lien can continue for 20 years. It is the responsibility of the judgment creditor to renew the lien, if the judgment has not been paid. When the judgment is paid, it is likewise the responsibility of the judgment creditor to release the lien as provided in Section 52.005.

*Property Code
Sec. 52.006
Sec. 52.005*

Special rules for discharging and canceling a judgment lien apply when the person against whom the judgment is rendered files bankruptcy. If the abstract was recorded before September 1, 1993, a court order must be issued regarding the cancellation of the judgment lien. The Clerk's only role is to perform the ministerial duties required relating to the hearing and the order.

*Property Code
Sec. 52.021-52.025*

For abstracts recorded on or after September 1, 1993, no further action by any court is required to discharge and cancel a judgment lien. Application of these laws and any exceptions to cancellation of the judgment lien is strictly between the bankrupt debtor and the judgment creditor; the Clerk has no role in these proceedings.

*Property Code
Sec. 52.041-52.043*

C. WRITS OF EXECUTION

A writ of execution (often termed an "execution") is a process issued by the Clerk that orders the sheriff to collect a judgment against a defendant. The sheriff either collects money or sells property belonging to the defendant for as much of the judgment as possible. The execution is returnable in 30, 60, or 90 days, as requested by the plaintiff or the plaintiff's attorney.

*TRCP 622
TRCP 621*

The Clerk issues the execution after the expiration of thirty days from the time the court signs the final judgment. Exceptions are:

TRCP 627

- If a supersedeas bond or notice of appeal has been filed by a party appealing the judgment and has been approved, no execution is issued.
- If a timely motion for new trial or motion in arrest of judgment is filed, the Clerk issues the execution after the expiration of thirty days from the time the order is overruled. Naturally, no execution is issued if the motion for new trial is granted, because the judgment would not be final in that case.
- If the plaintiff files an affidavit that the defendant is about to remove or dispose of property subject to execution, then execution may be issued before the thirtieth day after final judgment.

TRCP 628

An execution can be issued only if the judgment on which the execution is based is a valid final judgment. A judgment is not final unless it disposes of all the parties and the issues in a suit.

An execution cannot be issued if the party against whom a judgment has been entered has filed bankruptcy.

The procedure for issuing an execution is as follows:

- The plaintiff or his attorney submits a request for the execution. *TRCP 621*
- The Clerk collects the fee and posts the request and fee in the file docket.
- From the case minutes, the Clerk enters the amount of judgment, the interest rate, and any court costs due on the execution form. From the registry of the court and the file docket, the Clerk notes any payments made on the judgment and subtracts these payments from the amount to be collected. *TRCP 629*
- The Clerk completes the execution form by filling out the case number, style of case and date of issuance.
- The execution is then recorded in the execution docket and the volume and page number of the docket record is noted on the execution.
- When the sheriff makes his return, it is recorded in the execution docket along with the amount collected.

There are several specific types of execution. The requirements set forth are in addition to those covered above.

1. Judgment for Money

When the judgment requires the judgment debtor to pay a sum of money, the writ of execution must state the amount due and any interest to be paid. The writ must also require that the judgment and costs be paid out of the property of the judgment debtor subject to execution. *TRCP 630*

2. Sale of Particular Property

This type of writ of execution lists specific items of the defendant's property (real or personal) to be sold to satisfy judgment. The items to be sold must be described in the writ of execution. Notice of the sale must be given in accordance with the Rules of Civil Procedure, Rules 646a through 650. *TRCP 631*

3. Delivery of Certain Property

The writ of execution must describe the property to be delivered and the party to whom the judgment awards possession. The writ must also require the officer to deliver possession of the property to the party entitled to receive the property. *TRCP 632*

4. Possession of Value of Personal Property

This kind of writ is issued when it is presumed the officer will not be able deliver certain property. By this writ, the officer is authorized to levy and collect the value of the judgment from any property of the judgment debtor which is liable to execution. *TRCP 633*

As mentioned above, *TRCP 627* states that an execution shall not issue when a supersedeas bond is filed when a case is appealed. If the supersedeas bond is filed within the time allowed by law, and an execution has already been issued, the Clerk must immediately issue a writ of supersedeas. The writ of supersedeas suspends all proceedings under the execution. *TRCP 634*

D. TURNOVER ORDERS

A turnover order is a post-judgment remedy designed to aid a judgment creditor to obtain satisfaction of a judgment where the judgment debtor owns property that cannot be readily attached or levied on by ordinary legal process and is not exempt from execution for the satisfaction of liabilities. Some examples are property owned outside Texas, accounts receivable, and instruments of ownership (e.g., stock certificates, negotiable instruments, securities, etc.). These kinds of property can easily be secreted by the judgment debtor so that they cannot be found for execution by the sheriff or constable.

*Civ. Prac. &
Rem. Code
Sec. 31.002(a)*

Generally, the turnover order remedy will be used by a judgment creditor when the traditional methods of reaching nonexempt property of a judgment debtor (i.e., writs of execution, attachment, and garnishment) have not been successful.

A judgment creditor may move for the court's assistance under the "turnover" statute in the same proceeding in which the judgment is rendered or in an independent proceeding.

*Civ. Prac. &
Rem. Code
Sec. 31.002(d)*

If the court enters a turnover order, it may do one of the following:

*Civ. Prac. &
Rem. Code
Sec. 31.002(b)*

- Order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution.
- Otherwise apply the property to the satisfaction of the judgment.
- Appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

With respect to turnover of property held by a financial institution in the name of or on behalf of the judgment debtor as customer of the financial institution, the rights of a receiver do not attach until the financial institution receives service of a certified copy of the order of receivership in the manner specified by Section 59.008, Finance Code.

*Civ. Prac. &
Rem. Code
Sec. 31.002(g)*

A court may enter or enforce an order under this section that requires the turnover of nonexempt property without identifying in the order the specific property subject to turnover.

*Civ. Prac. &
Rem. Code
Sec. 31.002(h)*

Wages, before they are actually paid to the judgment debtor, cannot be subject to a turnover order. This prohibition applies to wages in any form. It also applies to the judgment debtor and any other party.

*Civ. Prac. &
Rem. Code
Sec. 31.0025*

E. WRITS OF GARNISHMENT

Garnishment is defined as money or property in the hands of a third party, belonging to a defendant, which is attached by the plaintiff. The third party holding the defendant's money or property is called the garnishee. Funds in a bank account are a very common subject of a garnishment action.

Writs of garnishment may not be issued before final judgment in a case unless the court so orders. Certain requirements, which do not apply for writs issued after final judgment, must be met for pre-judgment garnishments. General rules applying to all garnishments will be discussed first, then the specific rules for pre-judgment garnishments.

*TRCP
Rule 658*

1. General Rules

The garnishment action must be docketed separately from the underlying action. The Clerk collects all fees charged for filing a new case. In the garnishment action, the plaintiff is listed as the plaintiff, and the garnishee is listed as the defendant.

TRCP 659

The writ of garnishment is issued by the Clerk. It includes the cause number, court, and names of plaintiff(s) and defendant(s) in the original lawsuit. It states the time for the garnishee to answer. It also orders the garnishee to include in its answer what, if anything, it is indebted to the defendant for both at the time of service and on the date of the answer. The garnishee's answer must be made under oath.

Gov't Code
Sec. 51.318

Civ. Prac. &
Rem. Code
Sec. 63.002

TRCP 659
TRCP 661

The Clerk then delivers the writ to either the sheriff or constable, or to the plaintiff, for service on the garnishee. Most plaintiffs prefer to have the Clerk deliver the writ to the sheriff or constable, because those officers are required by statute to execute the writ immediately.

TRCP 662
TRCP 663

Once the garnishee has been served with the writ, the garnishee is prohibited from paying any money or releasing any property to the defendant. The exception is the payment of current wages, which are generally exempt from garnishment.

Civ. Prac. &
Rem. Code
Sec. 63.003
Sec. 63.004

Service of a writ of garnishment on a financial institution is governed by Section 59.008 of the Finance Code.

Civ. Prac. &
Rem. Code
Sec. 63.008

As soon as practicable after service of the writ on the garnishee, the defendant is to be served as provided for in TRCP 21a. The defendant must be served with a copy of the writ of garnishment, the application, accompanying affidavits and any orders of the court. The defendant must also be advised of his right to replevy.

TRCP 663a

NOTE: *There are new rules regarding the service by private process servers. See, Chapter IV, Section D for more information.*

2. Pre-Judgment Garnishments

A pre-judgment writ of garnishment is available if an original attachment has been issued or if a plaintiff has sued for a debt. In the latter case, the application for the writ must be accompanied by an affidavit stating that the debt is just, due and unpaid; that the defendant does not have property in Texas subject to execution that would be sufficient to satisfy the debt; and that the garnishment is not sought to injure the defendant or the garnishee.

Civ. Prac. &
Rem. Code
Sec. 63.001

A pre-judgment writ can be issued only upon order of the court, after a hearing. The court in its order granting the writ must make specific findings of fact supporting the granting of the order. The order must also state the maximum value of property or indebtedness that may be garnished. The order must further state the amount of bond required from the plaintiff, and the amount of bond required of the defendant should he or she choose to replevy.

TRCP 658

The writ of execution will not be issued until the plaintiff has filed the bond as required by the order authorizing the writ. The defendant or the plaintiff may file a motion to reduce or increase the amount of the bond, after notice to the other party. The court will issue its order on this issue only after a hearing.

TRCP 658a

3. Post-Judgment Garnishments

A writ of garnishment is available after final judgment if the plaintiff has a valid, subsisting judgment. The application for the writ is accompanied by an affidavit from the plaintiff stating that, as far as the plaintiff knows, the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment. As with pre-judgment garnishments, the application must state the grounds for issuing the writ and the specific facts upon which the plaintiff is relying.

TRCP 658

*Civ. Prac. &
Rem. Code
Sec. 63.001*

The judgment must be final as to all parties before the writ will be issued. If it is not, the pre-judgment procedures and rules apply.

F. WRITS OF SEQUESTRATION

Sequestration is a remedy in equity. It is the act of taking possession of property belonging to the judgment debtor and holding it until the profits have paid the demand for which it was taken.

The plaintiff may, at any time during a suit, file an application for writ of sequestration. In district court, the plaintiff must file a petition and pay the fees as for a suit. The application describes the property sued for, including the value of each article of property and the county where located. The plaintiff must also state his or her interest in the property. Affidavits of any persons having knowledge of relevant facts must be filed with the plaintiff's application.

*TRCP 696
TRCP 697*

*Gov't Code
Sec. 51.318*

The court will then conduct a hearing on whether to issue the writ of sequestration. If the court does grant the application, its order will state why the court decided as it did and describe the property involved, including its value and location. A bond will be required of the plaintiff sufficient to pay all damages and costs if the plaintiff ultimately loses the suit. The order will also set out the amount of bond required of the defendant if he or she decides to replevy or take back the property. This bond is usually equal to the value of the property plus interest, if allowable, and court costs. If the property sued for was in several counties the order may allow several writs to be issued at the same time or in succession.

*TRCP 696
TRCP 698*

Following the hearing and the issuance of the writ, the defendant (that is, the property owner) must be served with the writ as provided in Rule of Civil Procedure 21a. The defendant must be served with the writ, a copy of the application, the accompanying affidavits, and court orders. The defendant must also be advised of the right to replevy.

TRCP 699

By definition, a writ of sequestration is a pre-judgment procedure. What ultimately happens to the property sequestered depends on the final outcome of the underlying suit. The various procedures for disposition of property following final judgment are covered in Rules of Civil Procedure 704 through 734. The Clerk has only a limited, ministerial role in these proceedings; for example, docketing the returns of bonds as described in Rule 723.